Nov 8 1-64 Judgment Affirmed —

6, Black p. 346 —

~~32, Black 349~~

32, L. — Affirmed —

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~244.~~ 34

BENJAMIN CARVER, PLAINTIFF IN ERROR,

vs.

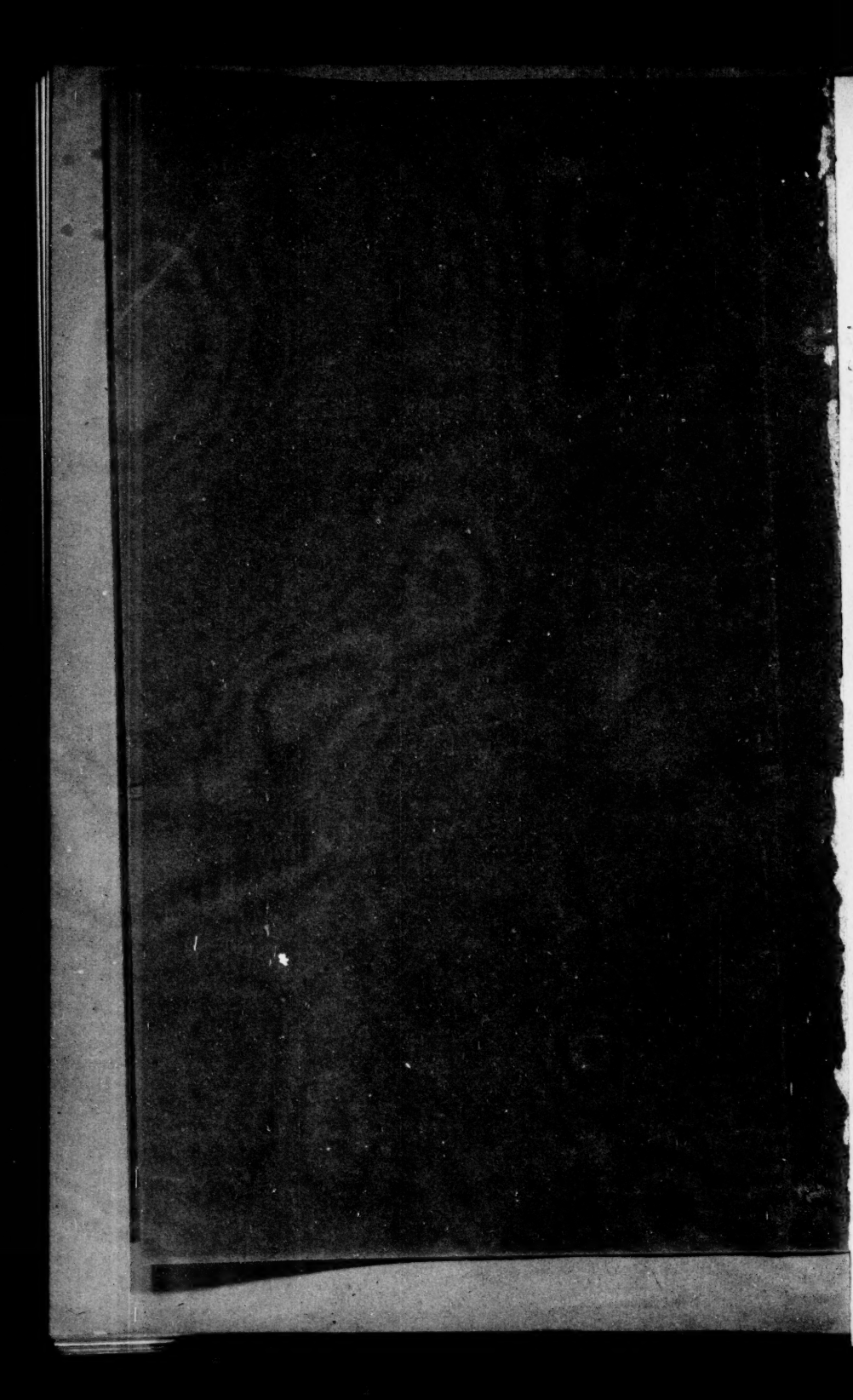
CLARK W. UPTON, ASSIGNEE OF THE GREAT WESTERN INSURANCE COMPANY, A BANKRUPT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 14, 1873.

Affirmed, ~~with~~

Sweyne with 35.



SUPREME COURT OF THE UNITED STATES.

No. 244.

BENJAMIN CARVER, PLAINTIFF IN ERROR.

vs.

CLARK W. UPTON, ASSIGNEE OF THE GREAT WESTERN INSURANCE COMPANY, A BANKRUPT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms in the city of Chicago, in the district aforesaid, on Monday the seventh day of July, in the July term of said court, in the year of our Lord one thousand eight hundred and seventy-three, and of our Independence the ninety-eighth year.

WILLIAM H. BRADLEY, *Clerk.*

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the fifth day of May, A. D. 1873, came Benjamin Carver, by his attorneys, and filed in the office of the clerk of the circuit court of the United States for the northern district
2 of Illinois, at Chicago, in said district, his transcript of a record from the district court of the United States for the northern district of Illinois, in a cause wherein Clark W. Upton, assignee in bankruptcy of the Great Western Insurance Company, a bankrupt, was plaintiff, and Benjamin Carver, defendant, together with the writ of error and the assignment of errors in said entitled cause, which said transcript, writ of error, and assignment of errors, are respectively in the words and figures following, to wit:

3 District court of the United States for the northern district of Illinois.

CLARK W. UPTON, ASSIGNEE IN BANKRUPTCY of the Great Western Insurance Company, a bankrupt, *vs.* BENJAMIN CARVER.	No. 3398. Assumpsit.

TRANSCRIPT OF RECORD.

4 Pleas in the district court of the United States for the northern district of Illinois, held at the United States court-rooms in the city of Chicago, in the district aforesaid, before the Hon. James C. Hopkins, judge, sitting in said district court, on Friday, the seventeenth day of January, A. D. eighteen hundred and seventy-three, in the December term, A. D. 1872, of said court, and of our Independence the ninety-seventh year.

WILLIAM H. BRADLEY, *Clerk.*

CLARK W. UPTON, ASSIGNEE IN BANKRUPTCY of the Great Western Insurance Company, a bankrupt, *vs.* BENJAMIN CARVER.	3398. At law. Assumpsit.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the twenty-fourth day of August, A. D. eighteen hundred and seventy-two, Clark W. Upton, assignee in bankruptcy of the Great Western Insurance Company, by his attorneys, filed in the office of the clerk of the district court of the United States for the northern district of Illinois, aforesaid, at Chicago, in said district, his præcipe for a writ of summons against Benjamin Carver, defendant, and also at the same time filed his bond for costs in said entitled cause,

which said præcipe and bond are respectively in the words and figures following, to wit:

Præcipe.

UNITED STATES OF AMERICA,
Northern district of Illinois, ss:

United States district court. September term, A. D. 1872.

CLARK W. UPTON, ASSIGNEE IN BANKRUPTCY of the Great Western Insurance Company, plaintiff,
vs.
BENJAMIN CARVER, DEFENDANT.
} Assumpsit. Damages $5,000.

5 The clerk of said court will issue a summons in the above-entled cause to said defendant in a plea of trespass on the case on promises, to the damage of said plaintiff in the sum of five thousand dollars. Returnable to the September term of said court, A. D. 1872.

H. P. SMITH,
A. N. WATERMAN,
W. C. GOUDY,
Plaintiff's Attorney.

To WM. H. BRADLEY, Esq., *Clerk.*

CHICAGO, *August* 23, 1872.

(Indorsed:) Filed this 24th day of Aug., A. D. 1872. W'm H. Bradley, clerk.

Bond for costs.

UNITED STATES OF AMERICA,
Northern district of Illinois, ss:

District court, September term, A. D. 1872.

CLARK W. UPTON, ASSIGNEE IN BANKRUPTCY of the Great Western Insurance Company,
vs.
BENJAMIN CARVER.
} In Assumpsit.

I enter myself security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court; and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him, I hereby agree and stipulate that execution may issue against my property for any costs taxed against the plaintiff.

Dated this 23d day of August, A. D. 1872.

A. N. WATERMAN.'

(Indorsed:) Filed Aug. 24th, A. D. 1872. W'm H. Bradley, clerk.

On the same day, to wit, the 24th day of August, A.D. 1872, a writ of summons issued out of said clerk's office against said defendant, in said

entitled cause, which said writ, together with the return of the marshal thereon, is in the words and figures following, to wit:

6 *Summons.*

District court of the United States of America, northern district of Illinois, ss.

The United States of America to the marshal of the northern district of Illinois, greeting:

We command you to summon Benjamin Carver, if found in your district, to be and appear before our judge of our district court of the United States for the northern district of Illinois, on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of October next, to answer unto Clark W. Upton, assignee in bankruptcy of the Great Western Insurance Company, of a plea of trespass on the case upon promises, to his damage, as it is alleged, of five thousand dollars. And have you then and there this writ.

Witness the Hon. Henry W. Blodgett, judge of the district court of the United States of America, at Chicago aforesaid, this 24th day of Aug't, in the year of our Lord one thousand eight hundred and seventy-two, and of our Independence the 97th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

Return.

I served the within summons by reading the same to, and in the presence and hearing of, Benjamin Carver, therein named, on the 4th day of September, A. D. 1872.

B. H. CAMPBELL, *U. S. Marshal.*
By S. H. TOURTELLOTTE, *Deputy.*

(Indorsed:) Filed Sept. 5th, A. D. 1872. Wm. H. Bradley, clerk.

On this day, to wit, the 25th day of September, A. D. 1872, said plaintiff, by his attorneys, filed in said clerk's office his declaration in said entitled cause; which said declaration is in the words and figures following, to wit:

7 *Declaration.*

District court of the United States for the northern district of Illinois, of the October term, in the year A. D. 1872, sitting in bankruptcy.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Clark W. Upton, who is assignee of the Great Western Insurance Company, a corporation heretofore created and existing under the laws of the State of Illinois, and having its principal office in the city of Chicago, within said northern district of Illinois, which said corporation has been heretofore, by the order and judgment of this honorable court, adjudged a bankrupt, in accordance with the provisions of an act of Congress of the United States, entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, and the amendments thereto, by Smith & Waterman, his attorneys, complains of Benjamin Carver, defendant in this action, and who

has been duly summoned, etc., on a plea of trespass on the case on promises.

For that, whereas the said bankrupt, the Great Western Insurance Company, being a corporation created and existing under and in pursuance of an act of the legislature of the State of Illinois, entitled "An act to incorporate the Great Western Insurance Company of Chicago, Illinois," approved February 4th, A. D. 1857, for the purpose of insurance and the taking of risks on all kinds of property, both marine and fire, and deriving profits from the said business of insurance to its stockholders, having a capital stock designated by the express terms of the said act of incorporation, and allowed as the sum of five hundred thousand dollars.

And whereas, afterwards, to wit, on the 25th day of June, A. D. 1870, under and in pursuance of the provisions of the laws of the State of Illinois, the charter of the said company was, by the stockholders and directors thereof, amended, so that its capital stock might be increased to five millions of dollars.

That said capital stock was divided into shares of one hundred dollars each, the subscription and payment for which stock constituted its only fund and means of paying the losses it might meet in the prose-
8 cution of its business. Five per cent. of its subscribed capital stock was required to be paid as a company fund in cash, and the balance to be secured to be paid on demand, or otherwise, by approved judgment-notes, by hypothecated stook-mortgages on real estate in Cook County, or other satisfactory security; that by its charter said corporation was impowered to do any and all acts consistent with the constitution and laws of the State of Illinois.

That by the laws of the State of Illinois in such case made, it was provided that the corporators of any insurance company organized in the State of Illinois should severally be liable for all debts and responsibilities of such company, to the amount of stock by him or them subscribed, until the whole amount of the capital stock of such company shall have been fully paid in, and a certificate thereof recorded.

And whereas the said defendant heretofore, to wit, on the 21st day of January, A. D. 1870, at Chicago, in the northern district of Illinois, subscribed for and took fifty shares of the capital stock of the said Great Western Insurance Company, and thereby became the owner and holder thereof, and then and there agreed and became bound and obligated thereby to pay the said Great Western Insurance Company twenty dollars per share of one hundred dollars each, in installments, to wit, twenty-five per cent. (of the said twenty dollars) on receipt of the stock certificate, twenty-five per cent. in three months, twenty-five per cent. in six months, and twenty-five per cent. in nine months from the date thereof; the balance, eighty per cent., to stand and remain on subscription without interest, which said original subscription so executed has been accidentally destroyed by fire.

And whereas, to wit, on the 21st day of January, A. D. 1870, the said Great Western Insurance did, in accordance with the terms and conditions of the subscription aforesaid, make, execute and deliver to the said defendant a certificate of, to wit, fifty shares of its capital stock so subscribed for and agreed to be taken by said defendant as aforesaid, which said certificate was taken and accepted by the said defendant, whereby the said defendant became and was a stockholder in said company, to the extent of, to wit, fifty shares of its capital stock apportioned and set apart to and vested in him as aforesaid, whereby
9 the said defendant became and ever since has continued to be a

stockholder in said Great Western Insurance Company, exercising all the rights, powers and privileges of a stockholder therein, by means whereof and by force of the statute in such case made and provided, the said defendant became liable to pay to said Great Western Insurance Company the sum of one hundred dollars upon each share of the capital stock of the said Great Western Insurance Company so taken, held and owned by him as aforesaid.

And whereas afterwards, to wit, on the 3rd day of January, A. D. 1872, to wit, at Chicago, in the northern district of Illinois, in consequence of great losses which said insurance company had, prior to that time, sustained by fire in the said city of Chicago aforesaid, and elsewhere, whereby its entire cash capital and assets were exhausted, by reason of its liability to its policy-holders, and to an amount greatly exceeding all its cash funds and means of payment, and in an amount largely in excess of all sums that can be collected on its entire unpaid capital stock and assets, which said liabilities are still outstanding, due and unpaid, and for the purpose of providing means of payment thereof to said insurance company by a vote of its directors and stockholders, duly convened for that purpose, to wit, on the day and year aforesaid, to wit, at Chicago, in the northern district of Illinois aforesaid, duly assessed, called in, and ordered paid, to wit, twenty per cent. of the then remaining unpaid eighty per cent. on each share of stock, to wit, twenty dollars on each share thereof, so held by its stockholders on said unpaid capital stock, of which the said stockholders then and there had notice, that only a small amount, to wit, twenty per cent., had been paid on the stock subscribed for and held by the said defendant as aforesaid, and which said sum so assessed, called in and ordered paid, is still due and owing from said defendant.

And whereas, afterwards, in consequence of its losses so sustained as aforesaid, and the delinquencies of its stockholders in the payment of the calls so made upon them as aforesaid, the said Great Western Insurance Company became unable to meet its liabilities, and upon a petition filed in bankruptcy, to wit, on the 17th day of January, A. D. 1872, by Richard M. Hooley against the said Great Western Insurance Company, the said insurance company was afterwards, to wit, on the
10 sixth day of February, A. D. 1872, adjudicated a bankrupt by the district court of the United States for the northern district of Illinois, in pursuance of the act of Congress of the United States in such case made and provided, as by the records thereof now remaining in said court will more fully and at large appear.

And whereas afterwards, to wit, on the eleventh day of April, A. D. 1872, the said Clark W. Upton was duly appointed assignee in bankruptcy of the estate of the said Great Western Insurance Company, in conformity with law, and a deed of assignment of all the estate, effects, and property of the said Great Western Insurance Company, a bankrupt as aforesaid, was executed in due form of law under the hand and seal of Homer N. Hibbard, esq., register in bankruptcy for the congressional district of the State of Illinois, and delivered to the said Clark W. Upton, so appointed assignee as aforesaid, thereby vesting in the said assignee the estate, property, and effects of the said bankrupt;

And whereas this honorable court, sitting in bankruptcy in and for the northern district of Illinois, on the application and petition of the said Clark W. Upton, assignee of the estate of said bankrupt as aforesaid, to wit, on the 5th day of July, A. D. 1872, made and entered of record, in this honorable court, a call upon the stockholders of the said bankrupt for the full payment of the entire unpaid capital stock of the

said bankrupt, severally held by them and each of them, and ordered the same paid as hereinafter set forth, which said call and order of payment was of the following tenor and effect, to wit:

IN THE MATTER OF THE GREAT WESTERN INSURANCE COMPANY, BANKRUPT. } In bankruptcy.

And now on this day comes C. W. Upton, assignee of the estate of said bankrupt, and makes application to this court, showing that a large amount of the capital stock of the said bankrupt remains upaid in part; that the whole amount of such capital stock will be required to be paid in order to meet the demands now due from and proven against the estate of said bankrupt; and upon investigation of the facts in the matter, and the court being fully advised in the premises, it is ordered
that the entire amount unpaid on the capital stock of the said
11 bankrupt be paid to said assignee on or before the 15th day of August, A. D. 1872, at his office in Chicago, Illinois, and, in default thereof, that said assignee proceed to collect the same. It is further ordered that notice of this call be given to the stockholders of said bankrupt so far as known, without unreasonable delay, by publication or otherwise.

And the plaintiff, assignee as aforesaid, avers that notice in accordance with the terms and conditions of said order of this honorable court was duly given to the stockholders of said bankrupt, as therein and thereby required.

That a small amount, to wit, twenty per cent. only, has been paid upon each of the said shares of stock in the bankrupt company, which are now held and owned by the said defendant. And whereas the said company did publish and advertise the entire amount unpaid upon its capital stock issued, including the amount unpaid upon the stock by the defendant held as aforesaid, as a part of its resources wherewith to pay losses and protect its creditors; and did procure the insurance, the losses upon which are now due and unpaid, and for the indebtedness upon which losses render it now insolvent, upon such publication and advertisement and by reason of the facts aforesaid, the said defendant is now indebted thereon to the plaintiff as assignee as aforesaid for the remaining unpaid portion, to wit, eighty per cent. thereof, to wit, for the sum of five thousand dollars.

Yet the said defendant, although often requested, has not paid the said several sums of money, or either or any part thereof, but has wholly neglected and refused so to do.

And whereas, also, the said defendant heretofore, to wit, on the eleventh day of April, A. D. 1872, to wit, at Chicago, in the northern district of Illinois, being the holder and owner of fifty other shares of one hundred dollars each of the capital stock of the Great Western Insurance Company aforesaid, upon which had been paid a small sum, to wit, twenty per cent. thereof, or twenty dollars on each share thereof, the residue and balance due thereon, to wit, being eighty per cent. thereof, to wit, eighty dollars on each share thereof, being subject to assessment on call of the said company, its board of directors, agents, or creditors,
whenever thereafterwards the same should be required to pay the
12 debts or liabilities of the said Great Western Insurance Company, in the due course of its business as an insurer against fire or marine losses, or both.

And whereas the said Great Western Insurance Company, in consequence of losses sustained by its policy-holders, for which it became and

was liable to pay, and indemnify against, to an amount greatly exceeding all its assets, and more than can be collected upon all of its said assets and unpaid capital stock, and which said liabilities are now subsisting and wholly unpaid, all of which the defendant had notice, and in consequence of the non-payment thereof, the said Great Western Insurance Company has been by the judgment and order of the district court of the United States for the northern district of Illinois, sitting in bankruptcy, on petition duly filed in said court for that purpose by its creditors, duly adjudged a bankrupt, in pursuance of the laws of the United States in that behalf enacted and provided, of which defendant had notice. And whereas upon such adjudication the said Clark W. Upton was appointed the assiguee of the estate of the said bankrupt, under and in pursuance of the bankrupt laws of the United States in that behalf enacted, and as such assignee now holds the estate of said bankrupt, in pursuance of said bankrupt law as aforesaid.

And whereas the said United States district court, sitting in bankruptcy, on petition duly filed for that purpose, did order and adjudge, among other things, that the whole amount of the unpaid capital stock of said insurance company, bankrupt, will be required to be paid in order to meet its liabilities and demands proven in bankruptcy against said bankrupt, and did further order that the entire amount unpaid on the capital stock of the said bankrupt insurance company be paid by its stockholders to the said plaintiff as assignee as aforesaid, on or before the 15th day of August, A. D. 1872, at his office in Chicago, Illinois, of which said defendant then and there had notice, as by the records and proceedings of the said court will more fully and at large appear, which said time has long since elapsed.

By means whereof, and by force of the statutes in such case made and provided, the said defendant became and is liable to pay to said plaintiff a large sum of money, to wit, eighty per cent., or eighty dollars on each share of stock so held and owned by him as aforesaid, to wit, five
13 thousand dollars, and which, though often requested, said defendant wholly neglects and refuses to pay, or any part thereof.

And whereas, also, the said defendant heretofore, to wit, on the 11th day of April, A. D. 1872, at Chicago, in the northern district of Illinois, aforesaid, became and was indebted to the Great Western Insurance Company, which said insurance company has been duly adjudged a bankrupt, in pursuance of law, for fifty shares of the capital stock of said company, of one hundred dollars each, before that time bargained, sold, set apart, and transferred to him, said defendant, by the said insurance company, on the books of said company, at his, said defendant's, special instance and request, the certificates whereof were delivered to said defendant, and being so indebted to the said defendant in consideration thereof, afterwards, to wit, on the day and year last aforesaid, to wit, at Chicago aforesaid, undertook, and then and there faithfully promised the said plaintiff as the assignee in bankruptcy of the estate of the said Great Western Insurance Company, bankrupt as aforesaid, duly appointed according to law, to pay him therefor when he, the said defendant, should be thereunto afterwards requested.

And also for that whereas, heretofore, to wit, at Chicago, in the northern district of Illinois, on, to wit, the eleventh day of April, A. D. 1872, the said defendant, at his special instance and request, became and was the legal owner of certain, to wit, fifty other shares of the stock of the said Great Western Insurance Company, of the par value of one hundred dollars each, upon which said stock there was unpaid and uncalled for at the said time, when the said defendant became the said legal

owner thereof, to wit, the sum of eighty dollars per share, the payment of which said sum of eighty dollars per share, always theretofore had been, and at the time the said defendant became the legal owner thereof as aforesaid, was unsecured to said company, save by the obligation of whoever might be the legal owner thereof to pay the same, and which said sum of eighty dollars per share he, the said defendant, upon becoming the legal owner of said stock, in consideration of the rights and privileges thereby by him, said defendant, acquired, promised and agreed to and with said company that he, the said defend-
14 ant, would pay to said company upon each and every of said shares so by him owned as aforesaid, whenever he, the said defendant, should be legally and properly called upon so to do.

And the plaintiff saith that said defendant hath often been legally and properly called upon to pay the said sum of eighty dollars per share upon each of said fifty shares so by him owned as aforesaid, to wit, the sum of five thousand dollars, and that he, said defendant, was, at the time of so being called upon to pay said sum, the legal owner of, to wit, said fifty shares of said stock. Nevertheless he, the said defendant, hath not paid the same or any part thereof to said company, or to this plaintiff, whereby an action hath accrued to this plaintiff as assignee in bankruptcy, to have and demand of the said defendant the said sum of five thousand dollars.

And whereas, also, the said defendant afterwards, to wit, on the day and year last aforesaid, at Chicago, in the northern district of Illinois aforesaid, was indebted to the said plaintiff assignee as aforesaid in the further sum of five thousand dollars, like lawful money, for fifty shares of the capital stock of the Great Western Insurance Company, theretofore issued and delivered to him, the said defendant, of the par value of one hundred dollars per share, by the Great Western Insurance Company, at his, the said defendant's, special instance and request, and which said shares of said capital stock were severally at the commencement of this suit owned and held by him, the said defendant; and being so indebted, he, the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at Chicago aforesaid, undertook, and then and there faithfully promised, to pay said last-mentioned sum of money when he, the said defendant, should be thereunto afterwards requested; yet. though often requested, said defendant wholly neglects and refuses to pay therefor, or for any part thereof.

And whereas, also, afterwards, to wit, on the day and year last aforesaid, to wit, at Chicago aforesaid, in consideration that the Great Western Insurance Company, a corporation theretofore created, and existing under and in pursuance of the laws of the State of Illinois, at the like special instance and request of the said defendant, had before that time issued in due form of law, and delivered to him, the said defend-
15 ant, fifty shares of its capital stock, of the par value of one hundred dollars for each and every share so issued and delivered to said defendant, he, the said defendant, undertook, and then and there faithfully promised the said Great Western Insurance Company, and the said plaintiff as its assignee, legally appointed, to pay for the said shares so issued to and held by him, the said defendant as aforesaid, the sum of one hundred dollars for each and every share of the said capital stock so issued and delivered to him, the said defendant, as aforesaid, when he should be thereunto afterwards requested; yet, though often requested, said defendant has not paid the said sum of money, or any part thereof, to the said Great Western Insurance Company, or to

the plaintiff, its assignee as aforesaid, but wholly neglects and refuses so to do.

And whereas, also, the said defendant heretofore, to wit, on the eleventh day of April, A. D. 1872, at Chicago, in the northern district of Illinois, was indebted to the Great Western Insurance Company, a corporation theretofore created and existing under and in pursuance of the laws of the State of Illinois, and to the plaintiff at the commencement of this suit as assignee thereof, for that purpose duly appointed, for divers stocks, goods, and chattels, to wit, fifty shares of the capital stock of the Great Western Insurance Company, of the par value of one hundred dollars, for each and every share before that time subscribed for, issued to and held by the said defendant, at his special instance and request, whereby the said defendant became and was a stockholder in the said Great Western Insurance Company, the rights and privileges whereof the said defendant used and enjoyed, with the gains and profits thereunto pertaining; and being so indebted, he, the said defendant, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at the said city of Chicago aforesaid, undertook, and then and there faithfully promised the said plaintiff's assignee as aforesaid, to pay him for the said goods, chattels, and stock at the rate of one hundred dollars per share thereof, when he, the said defendant, should be thereunto afterwards requested.

Yet, though often requested, the said defendant wholly neglects and refuses to pay either of the sums of money in the several counts of this declaration mentioned, or any part thereof, to the said plaintiff
16 assignee as aforesaid, to the plaintiff's damage as assignee as aforesaid, as he says, in the sum of five thousand dollars; and therefore he brings suit.

By SMITH & WATERMAN,
His Att'ys.

The original subscription paper mentioned in first count having been destroyed by fire, a copy thereof is not given.

SMITH & WATERMAN, *Att'ys.*

(Indorsed:) Filed Sept. 25, 1872. W'm H. Bradley, cl'k.

On this day, to wit, the 7th day of October, A. D. 1872, said defendant, by his attorneys, filed in said clerk's office his plea in said entitled cause, which said plea is in the words and figures following, to wit:

Plea.

In the district court of the United States for the northern district of Illinois. To the October term, A. D. 1872.

BENJAMIN F. CARVER *ads.* CLARK W. UPTON, ASSIGNEE, ETC. } Assumpsit.

And now comes the said Benjamin F. Carver, defendant, by Thompson & Bishop, his attorneys, and defends the wrong and injury when, etc., and says that he did not undertake and promise in manner and form as the said plaintiff hath in his said declaration thereof complained against him; and of this he puts himself upon the country, etc.

By THOMPSON & BISHOP,
Att'ys for Def't.

And the pl'ff does the like.

By BOUTELL & WATERMAN,
His Att'ys.

(Indorsed:) Filed Oct. 7, 1872. W'm H. Bradley, cl'k.

On this day, to wit, the 23d day of December, in the December term, A. D. 1872, of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. James C. Hopkins, judge, is the following entry, to wit:

17 *Jury empaneled.*

CLARK W. UPTON, ASSIGNEE IN BANKRUPTCY of the Great Western Insurance Company, a bankrupt,
vs.
BENJAMIN F. CARVER. } Assumpsit.

Now come the parties by their attorneys, and upon issue joined thereupon come a jury of good and lawful men, to wit, A. Richards, A. Philleo, G. H. Hunter, Charles Carpenter, C. W. Rogers, J. G. Ragan, Thomas Thayer, M. Robinson, George Meisters, S. McCotter and William Petty, who were all duly elected, tried and sworn well and truly to try said issue, and after hearing a part of the evidence, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

On this day, to wit, the 24th day of December, A. D. 1872, in said December term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. James C. Hopkins, judge, is the following entry, to wit:

CLARK W. UPTON, ASSIGNEE, ETC.,
vs.
BENJAMIN F. CARVER. } Assumpsit.

Now come again the parties by their attorneys, and now come also the jury in this behalf empaneled and sworn, and after hearing the concluding evidence, on motion of the plaintiff by his attorney leave is given him to amend the bond for costs, præcipe, summons, declaration and plea filed herein, by striking out the letter F in the defendant's name and making it Benjamin Carver, to which leave the defendant by his attorney excepts, and after hearing the arguments of counsel, and receiving the instructions of the court, the jury retired to consider of their verdict, and after a short absence the jury returned into court the following verdict, to wit: We the jury find the issue for the plaintiff, and assess his damages to the sum of four thousand and eighty-six dollars.

And thereupon the defendant by his attorney moves the court for a new trial herein.

18 On this day, to wit, the 17th day of January, A. D. 1873, in the December term, A. D. 1872, of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. James C. Hopkins, judge, is the following entry, to wit:

Judgment.

CLARK W. UPTON, ASSIGNEE IN BANKRUPTCY of the Great Western Insurance Company, a bankrupt,
vs.
BENJAMIN CARVER. } Assumpsit.

Now come the parties by their attorneys, and now comes on to be heard

the motion of the defendant, heretofore entered herein for a new trial of this cause, and after hearing the arguments, the court being sufficiently advised in the premises, overrules said motion, and thereupon the defendant by his attorney moves the court in arrest of judgment, which is overruled.

It is thereupon considered and adjudged by the court that the plaintiff do have and recover of the defendant the said sum of four thousand and eighty-six dollars, his damages so as aforesaid assessed, together with his costs in this behalf expended, amounting to the sum of one hundred forty-eight dollars and seventy-two cents, and that he have execution therefor.

On the hearing of said cause the following exceptions were taken, and were allowed by the court and made of record, and are in the words and figures following, to wit:

Bill of exceptions.

District court of the United States, northern district of Illinois.

CLARK W. UPTON, ASSIGNEE OF THE GREAT Western Insurance Company,
vs.
BENJAMIN CARVER.

Be it remembered that on the trial of this cause theplaintiff, to maintain the issue on his part, offered in evidence the following order
19 of the district court of the United States for the northern district of Illinois, entered on the 5th day of July, A. D. 1872, to wit:

IN THE MATTER OF THE GREAT WESTERN INSURANCE COMPANY, BANKRUPT. } In bankruptcy.

And now on this day comes C. W. Upton, assignee of the estate of said bankrupt, and makes application to this court, showing that a large amount of the capital stock of the said bankrupt remains unpaid in part; that the whole amount of such capital stock will be required to be paid, in order to meet the demends now due from and proven against the estate of said bankrupt; and upon investigation of the facts in the matter, and the court being fully advised in the premises, it is ordered that the entire amount unpaid on the capital stock of the said bankrupt be paid to said assignee, on or before the 15th day of August, A. D. 1872, at his office in Chicago, Illinois; and in default thereof, that said assignee proceed to collect the same. It is further ordered that notice of this call be given to the stockholders of said bankrupt, so far as known, without unreasonable delay, by publication or otherwise.

No evidence was offered tending to show that any notice of the application for this order was given to the defendant, or that he was made a party to the proceedings, or had any knowledge of the making of said order when made.

The defendant objected to the admission in evidence of said order on the following grounds:

1. The proceedings in the district court were ex parte, without notice to defendant.

2. The court had no authority to make said order.

3. The order is not of the nature of a judgment, and is not binding or conclusive on defendant in this suit.

The court overruled the objection, and ruled that if the defendant was proved to be a stockholder of said company, said order was binding and conclusive upon him in this action.

To which ruling of the court the defendant then and there duly excepted, and said order was read in evidence.

The following notice was then proved to have been sent to the defendant, by mail, in July, 1872, prior to the commencement of this suit, to wit:

20 "OFFICE OF THE ASSIGNEE OF THE
"GREAT WESTERN INSURANCE COMPANY,
"163 *East Washington st., Chicago, July 8th*, 1872.

"To BENJAMIN CARVER, *Chicago, Illinois:*

"You are hereby notified that on petition filed and proofs heard in the matter of the Great Western Insurance Company, a bankrupt, in the district court of the United States for the northern district of Illinois, the following order was made and entered of record in said court, on the fifth day of July, 1872, viz:

"'IN THE MATTER OF THE GREAT WESTERN Insurance Company, bankrupt. } In bankruptcy.

"'And now on this day comes C. W. Upton, assignee of the estate of said bankrupt, and makes application to this court, showing that a large amount of the capital stock of the said bankrupt remains unpaid in part; that the whole amount of such capital stock will be required to be paid, in order to meet the demands now due from and proven against the estate of said bankrupt; and upon investigation of the facts in the matter, and the court being fully advised in the premises, it is ordered that the entire amount unpaid on the capital stock of the said bankrupt be paid to said assignee, on or before the 15th day of August, A. D. 1872, at his office in Chicago, Illinois. And in default thereof, that said assignee proceed to collect the same.

"'It is further ordered that notice of this call be given to the stockholders of said bankrupt, so far as known, without unreasonable delay, by publication or otherwise."

"'The holders of the unpaid capital stock in said bankrupt corporation will please take notice and govern themselves accordingly. Under the order of said court, and the action of the officers of said company, prior to bankruptcy, per cent. of the stock held by you now standing on the books of said bankrupt is long past due. The balance, by the order of said court, will become due August 15th, 1872. By prompt remittance of the amount now due, costs will be avoided.

"'Respectfully,

"'C. W. UPTON, *Assignee.*'"

21 It was also shown that the above notice was published 'hirty days prior to August 15, 1872, in the Inter-Ocean, a newspaper of general circulation in this district.

The plaintiff then offered evidence tending to show that in or about January, 1870, the defendant received from the company a certificate of stock in said company in words and figures as follows:

["Number 26. Shares 50.]

"THE GREAT WESTERN INSURANCE COMPANY.

"This is to certify that Benjamin Carver is entitled to fifty shares in

the capital stock of the Great Western Insurance Co. of Chicago, Ill's, of one hundred dollars each, transferable only on the books of the company, in person or by attorney, on the surrender of this certificate, being subject to the charter and by-laws of said company, of which twenty per cent. is payable as follows: Five per cent. on receipt stock certificate, five per cent. in three months from date hereof, five per cent. in six months from date hereof, five per cent. in nine months from date hereof, the balance being subject to the call of the directors as they may be instructed by the majority of the stockholders represented at any regular meeting."

"Ten per cent. annual dividend from the surplus earnings guaranteed to stockholders on cash capital paid in.

"Chicago, Ill's, January 21st, 1870.

"J. D. WOODWARD, *Secretary.*
"L. S. MAJOR, *President.*"

The plaintiff offered evidence tending to prove that 20 per cent. or one thousand dollars has been paid on said stock by the defendant, and no evidence was offered tending to prove that any more had been paid on said stock; and it was proved that defendant received a dividend of fifty dollars on said stock.

No evidence was offered of any subscription for stock of the company by the defendant or of any other express contract on the part of the defendant, and no evidence was offered tending to prove that the directors of said company had made any call for the payment of any portion of said stock under the direction of the stockholders, or that the stockholders, or a majority of them, represented at any regular meeting, had ever instructed the directors to make such call.

The defendant objected to the evidence as variant from the con-
22 tract declared on, and as no ground for recovery in this action, but the court overruled the objection, and the defendant then and there excepted, and the evidence was admitted.

There was evidence that the defendant had resided in the city of Chicago, Illinois, during the past three years.

The plaintiff having rested his case, the defendant moved to exclude all evidence on these grounds:

1. That no sufficient case, in point of law, was made under the declaration.

2. That there was a variance between the proofs and the allegations of the declaration.

3. That upon the evidence the plaintiff has no remedy at law.

4. That there is no sufficient evidence that the defendant was a stockholder July 5, 1872, or that there was anything unpaid on stock then held by him.

Which motion the court denied, and the defendant then and there duly excepted.

And thereupon the court instructed the jury that if they were satisfied from the evidence that the defendant was a stockholder to the amount of 50 shares of the stock of said company in 1870; that he had paid 20 per cent. and received a dividend on such stock, the presumption of law, in the absence of any proof to the contrary, was that he was still the holder of such stock, and that the balance of such stock was unpaid.

To which instruction the defendant then and there duly excepted.

The court then instructed the jury that the order of the district court, offered in evidence, was conclusive in these proceedings, and that the

jurisdiction of the bankruptcy court could not be questioned in this suit

To which instruction the defendant then and there duly excepted.

The court then instructed the jury that if they were satisfied from the evidence that the defendant was a stockholder in said company they should find a verdict for the plaintiff for the amount unpaid on such stock with interest thereon, at the rate of six per cent. per annum, since the 15th day of August, A. D. 1872.

To which instruction the defendant, by his counsel, then and there duly excepted.

23 And the jury having rendered a verdict for the plaintiff, the defendant moved that the verdict be set aside and a new trial granted.

Which motion was overruled, and the defendant then and there duly excepted and moved in arrest of judgment, which motion was also overruled, and the defendant then and there duly excepted, and thereupon judgment was rendered against the defendant, and the defendant then and there excepted.

And inasmuch as the matters aforesaid do not appear of record, the defendant prays that this, his bill of exceptions, may be signed, sealed, and made part of the record of said cause, which is done.

J. C. HOPKINS, [SEAL.]
U. S. Dist. Judge.

(Indorsed:) Filed January 17th, 1873. W'm H. Bradley, clerk.

On this day, to wit, the 15th day of February, A. D. 1873, the following bond on appeal was filed in said clerk's office in said entitled cause which said bond is in words and figures following, to wit:

Appeal bond.

Circuit court of the United States for the northern district of Illinois.

CLARK W. UPTON, ASSIGNEE IN BANKRUPTCY of the Great Western Insurance Company of Chicago,
vs.
BENJAMIN CARVER.

Know all men by these presents that we, Benjamin Carver and Hiram Cornell, both of the city of Chicago, Cook County, Illinois, are held and firmly bound unto Clark W. Upton, assignee in bankruptcy of the Great Western Insurance Company of Chicago, in the sum of six thousand dollars, lawful money of the United States, to be paid to the said Clark W. Upton, assignee, his successors or assignees, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals and dated this 15th day of February, A. D. 1873.

24

Whereas the above-bounden Benjamin Carver hath prosecuted a writ of error to the circuit court of the United States for the northern district of Illinois, to reverse the judgment rendered in the above-entitled suit by the district court of the United States for the northern district of Illinois:

Now, therefore, the condition of this obligation is such, that if the above-named Benjamin Carver shall prosecute his said writ of error to

effect and answer all damages and costs, if he shall fail to make good his plea, then his obligation shall be void; otherwise the same shall be and remain in full force and effect.

B. CARVER. [SEAL.]
HIRAM CORNELL. [SEAL.]

Approved:
H. W. BLODGETT, *Judge.*

(Indorsed) Filed Feb'y 15, 1873. W'm H. Bradley, clerk.

On this day, to wit, the third day of March, A. D. 1873, said parties, by their attorneys, filed in said clerk's office their stipulation in said entitled cause, which said stipulation is in the words and figures following, to wit:

Stipulation extending time of return.

In the district court of the United States, northern district of Illinois, March term, A. D. 1873.

BENJAMIN CARVER, PLAINTIFF IN ERROR, *vs.* CLARK W. UPTON, ASSIGNEE OF THE GREAT Western Insurance Company, defendant in error. } Error to U. S. district court, nor. dist. of Illinois.

It is stipulated and agreed by and between the parties to the above-entitled cause, that the time for filing the record in said cause in circuit court shall be extended to the 15th day of March, 1873.

March 3, 1873.

BOUTELL & WATERMAN,
Pl'ff's Atty's.

THOMPSON & BISHOP,
Att'ys for Def'ts below.

(Indorsed:) Filed March 3, 1873. W'm H. Bradley, clerk.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the district court of the United States for the said northern district of Illinois, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in said entitled cause, wherein Clark W. Upton, assignee, etc., is plaintiff, and Benjamin Carver is defendant, as appears from the records of said district court remaining in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said district court at my office in the city of Chicago, in the district aforesaid, this sixth day of March, A. D. 1873, and of our Independence the 97th year.

[SEAL.] W'M H. BRADLEY, *Clerk.*

(Indorsed:) Filed March 6th, 1873. W'm H. Bradley, clerk.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to the honorable the judge of the district court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said district court, before you, between Clark W. Upton, assignee in bankruptcy of the Great Western Insurance Company, a bankrupt, plaintiff, and Benjamin Carver, defendant, a manifest error hath happened, to the great damage of the said Benjamin Carver, as by his said complaint appears, and it being fit that the error, if any there hath been, should be duly cor-
26 rected, and full and speedy justice done to the parties aforesaid, in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the circuit court of the United States for the northern district of Illinois, together with this writ, so that you have the same at Chicago, in said district, on the first Monday of March next, in the said circuit court, to be then and there held, that the record and proceedings being inspected, the said circuit court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the honorable Salmon P. Chase, Chief-Justice of the Supreme Court of the United States, this twentieth day of January, A. D. 1873, and of our Independence the 97th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

(Endorsed:) Filed May 5, 1873. Wm. H. Bradley, clerk.

Circuit court of the United States, northern district of Illinois.

BENJAMIN CARVER, PLAINTIFF IN ERROR,
vs.
CLARK W. UPTON, ASSIGNEE OF THE GREAT Western Insurance Company, defendant in error.

} Error to the dist. court of the United States for the northern district of Illinois.

Assignment of errors.

And now comes the plaintiff in error, and assigns the following grounds of error in the above-entitled cause:

I. The admission in evidence of the order of the U. S. district court, entered July 5, 1872.

II. The ruling of the court below that said order was binding and conclusive on defendant in this suit.

III. The admission in evidence of evidence tending to show that defendant received certificate of stock in January, 1870.

IV. The ruling of the court in denying motion to exclude evidence.

V. The instruction of the court that if defendant was holder of stock in 1870 on which 20 per cent. was paid, the presumption of law
27 was that he was holder of such stock at time of trial, and that balance of stock was unpaid.

VI. The instruction of the court that the order of the district court was conclusive, and that the jurisdiction of said court could not be questioned in this suit.

VII. The instruction of the court that the plaintiff was entitled to a verdict for amount unpaid on stock, and interest from August 15, 1872.

VIII. The denial of motion for a new trial.

IX. The denial of motion in arrest of judgment.

X. The rendering of judgment against defendant.

And defendant prays that said judgment be reversed.

THOMPSON & BISHOP,
Att'ys for Pl't'ff in Error.

(Endorsed:) Filed May 5, 1873. Wm. H. Bradley, cl'k.

Afterwards, to wit: on the second day of July, in the May term, A. D. 1873, of said circuit court of the United States for the northern district of Illinois, in the record of the proceedings thereof in said entitled cause, before the Hon. Thomas Drummond, judge, appears the following entry, to wit:

28 CLARK W. UPTON, ASSIGNEE, &C., *vs.* BENJAMIN CARVER. } In error.

Now come the parties by their attorneys, and thereupon this cause is set down for hearing upon the record herein, from the district court, and after hearing the arguments of counsel the court, not being sufficiently advised in the premises, takes time to consider.

Afterwards, to wit: on the 7th day of July, in the July term, A. D. 1873, of the circuit court of the United States for said northern district of Illinois, in the record of the proceedings thereof in said cause before the Hon. Thomas Drummond, judge, appears the following entry, to wit:

29 BENJAMIN CARVER, *v.* CLARK W. UPTON, ASSIGNEE OF THE GREAT Western Insurance Company. } In error from district court.

This cause having been heretofore argued by the counsel of the respective parties, and the court being now fully advised, affirms the judgment of the district court; and it appearing that a judgment was rendered in the district court in favor of Clark W. Upton, assignee in bankruptcy of the Great Western Insurance Company, the defendant in error, and against Benjamin Carver, the plaintiff in error, on the seventeenth day of January, in the year of our Lord one thousand eight
30 hundred and seventy-three, for the sum of four thousand and eighty-six dollars, and one hundred and forty-eight dollars and seventy-two cents costs.

It is therefore considered and adjudged by the court, that the said Clark W. Upton, assignee of the Great Western Insurance company, the defendant in error, do have and recover of the said Benjamin Carver, the plaintiff in error, the sum of four thousand and eighty-six dollars, the amount of the said judgment in the district court, together with the sum of one hundred and forty-eight dollars and seventy-two cents, the costs, and also the further sum of one hundred and nineteen dollars and ninety-nine cents, the interest which has accrued on the said judg-
31 ment; amounting in all to the sum of four thousand three hundred and fifty-four dollars and seventy-one cents, together with

his costs and charges in this behalf expended, amounting to the sum of forty dollars and thirty cents, and that he have execution therefor.

Afterwards, to wit, on the 28th day of August, A. D. 1873, said Benjamin Carver, by his attorney, filed in said clerk's office his bond in said case, which said bond is in words and figures following, to wit:

Know all men by these presents, that we, Benjamin Carver and Watts S. Carver, both of the city of Chicago, in the county of Cook and
32 State of Illinois, are held and firmly bound unto Clark W. Upton, assignee in bankruptcy of the Great Western Insurance Company of Chicago, in the sum of six thousand dollars lawful money of the United States, to be paid to the said Clark W. Upton, assignee, his certain attorney, successors, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents, sealed with our seals and dated this 27th day of August, A. D. 1873.

Whereas lately at a term of the circuit court of the United States for the northern district of Illinois, begun and holden on the first
33 Monday of July, A. D. 1873, in a suit depending in said court between Benjamin Carver, plaintiff in error, and Clark W. Upton, assignee in bankruptcy of the Great Western Insurance Company, a bankrupt defendant in error, judgment was rendered against the said Benjamin Carver, and the said Benjamin Carver having obtained a writ of error to the Supreme Court of the United States, and filed a copy thereof in the clerk's office of the said circuit court, to reverse the judgment in the aforesaid suit, and a citation to the said Clark W.
34 Upton, assignee, citing and admonishing to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now the condition of the above obligation is such, that if the said Benjamin Carver shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make his said plea good, then the above obligation to be void; else to remain in full force and virtue.

B. CARVER. [SEAL.]
W. S. CARVER. [SEAL.]

Selead and delivered in presence of—
JOHN H. THOMPSON.

Approved:

THOMAS DRUMMOND.

(Endorsed:) Filed August 28, 1873. W'm H. Bradley, cl'k.

35 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said circuit court in said cause, wherein Benjamin Carver is plaintiff in error, and Clark W. Upton, assignee, &c., defendant in error, as appears from the records of said circuit court remaining in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court, at Chicago, in said district, this tenth day of September, A. D. 1873.

[SEAL.] WM. H. BRADLEY, *Clerk.*

36 UNITED STATES OF AMERICA, *ss:*

The United States to the honorable the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court of the United States for the northern district of Illinois, before you, between Benjamin Carver, plaintiff in error, and Clark W. Upton, assignee in bankruptcy of the Great Western Insurance Company, bankrupt, defendant in error, a manifest error hath happened, to the great damage of the said Benjamin Carver, as by his complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and
37 openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Nathan Clifford, acting Chief-Justice of the Supreme Court of the United States, this 27th day of August, in the year of our Lord one thousand eight hundred and seventy-three, and of our Independence the 98th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

38 The United States of America, greeting: To Clark W. Upton, assignee in bankruptcy of the Great Western Insurance Company:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein Benjamin Carver is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

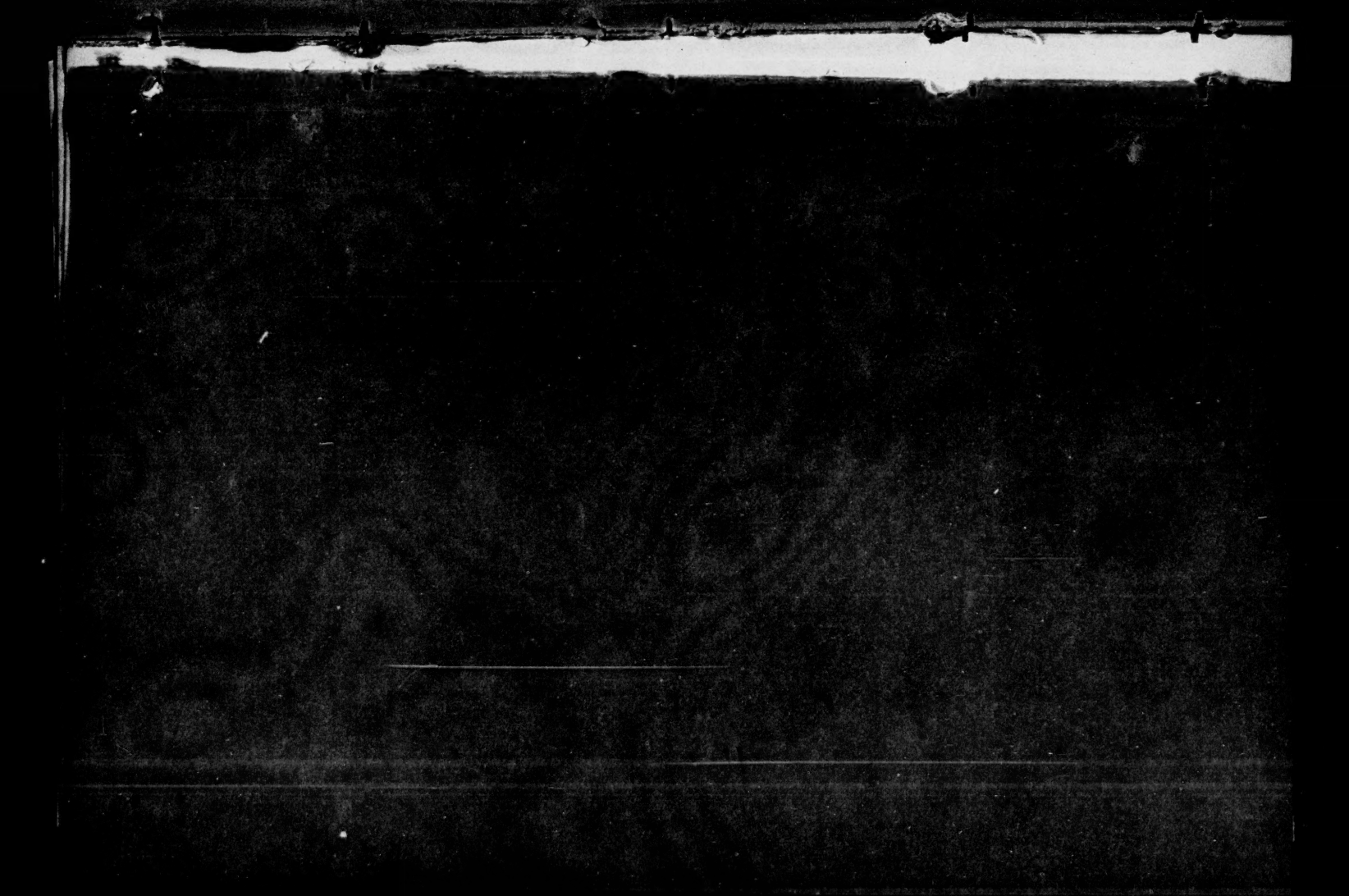
Witness the honorable Nathan Clifford, acting Chief-Justice of the Supreme Court of the United States, this 28th day of August,
39 in the year of our Lord one thousand eight hundred and seventy-three.

THOMAS DRUMMOND, *Judge.*

Received a copy of the above citation, this 28th day of August, A. D. 1873.

BOUTELL & WATERMAN,
Attorneys of Clark W. Upton, assignee of the Great Western Insurance Company of Chicago, bankrupt.

(Indorsement on cover:) No. 244. Benjamin Carver, plaintiff in error, vs. Clark W. Upton, assignee of the Great Western Insurance Company, a bankrupt. N. Illinois C. C. U. S. Filed 14th October, 1873.



SUPREME COURT OF THE UNITED STATES.

No. 244.

BENJAMIN CARVER, PLAINTIFF IN ERROR,

vs.

CLARK W. UPTON, ASSIGNEE, ETC., DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

STATEMENT, ERRORS,

AND

BRIEF FOR PLAINTIFF IN ERROR.

JOHN H. THOMPSON,

Att'y for Plaintiff in Error.

CHICAGO LEGAL NEWS CO. PRINT.

Supreme Court of the United States

Supreme Court of the United States.

No. 244.

BENJAMIN CARVER,
Plaintiff in Error,

v.

CLARK W. UPTON,
Assignee, &c., Defendant in Error.

In Error to United States Circuit Court for Northern District of Illinois.

STATEMENT OF CASE.

This is a writ of error to the Circuit Court of the United States for the Northern District of Illinois, to reverse a judgment affirming a judgment of the District Court of the United States for the Northern District of Illinois, and rendering a new judgment for amount of judgment, in the District Court, with costs and interest thereon.

This suit was an action in assumpsit brought in the United States District Court by the assignee of the Great Western Insurance Company, a bankrupt, against the plaintiff in error, to recover money claimed to be due from him as a stockholder, and as an unpaid balance on capital stock.

The declaration contains seven counts.

The first and second are special counts, not in assumpsit, neither of them alleging any undertaking or promise

on the part of the defendant. The first recites the organization of the company, the liability of corporators under the laws of Illinois for debt to amount of stock subscribed, the subscription by defendant for fifty shares of stock in the company, the taking of a certificate of the stock, a call by the directors and stockholders for the unpaid eighty per cent. of the stock, the bankruptcy of the company, a call upon the stockholders by order of the United States District Court, and that the defendant is now indebted to the plaintiff for the remaining unpaid portion of such stock.

The second count sets forth that defendant became the holder and owner of fifty shares of the capital stock of the Great Western Insurance Company, on which twenty per cent. had been paid, leaving a balance of eighty dollars a share, subject to assessment on call of the company, its directors, agents or creditors, that the company had been adjudged a bankrupt, and the United States District Court had ordered that the amount unpaid on the capital stock be paid to the assignee on or before August 15, 1872, and concludes with alleging, that thereby and by force of the statutes, defendant became, and is, liable to pay to plaintiff eighty dollars on each share of stock.

The fourth count does not allege any promise to plaintiff, but recites a promise to the company in consideration of the rights and privileges acquired by defendant as the legal owner of fifty shares of stock.

The other counts are general counts in *indebitatus assumpsit.*

Plea of the general issue and replication.

The case was tried before the Hon. James C. Hopkins and a jury.

On the trial the plaintiff offered in evidence an order of the U. S. District Court for the Northern District of Illinois, made in the matter of the Great Western Insur-

ance Company, in bankruptcy, on application of plaintiff without any notice to defendant, whereby it was ordered that the amount unpaid on the capital stock of the bankrupt be paid to the assignee on or before the 15th day of August, A. D. 1872, and in default thereof that the assignee proceed to collect the same.

This order was objected to by defendant, but the court overruled the objection, and ruled that if defendant was proved to be a stockholder in the company, the order was binding and conclusive upon him in this action, to which ruling defendant excepted.

It appeared that defendant resided in Chicago when the order was made, and that notice of the order was sent to him by mail after it was made.

Plaintiff offered evidence tending to show that the following certificate of stock was received by the defendant in or about January, A. D. 1870.

"Number 26. Shares 50.

"*The Great Western Insurance Company.*

This is to certify that Benjamin Carver is entitled to fifty shares in the capital stock of the Great Western Insurance Co. of Chicago, Ills., of one hundred dollars each, transferable only on the books of the company in person, or by attorney, on the surrender of this certificate, being subject to the charter and by-laws of said company, of which twenty per cent. is payable as follows: Five per cent. on receipt stock certificate; five per cent. in three months from date hereof; five per cent. in six months from date hereof; five per cent. in nine months months from date hereof; the balance being subject to the call of the directors as they may be instructed by the majority of the stockholders represented at any regular meeting.

Ten per cent. annual dividend from the surplus earnings guaranteed to stockholders on cash capital paid in.

"J. D. WOODWARD, Secretary.

"L. S. MAJOR, President."

Chicago, Ills., January 21st, 1870.

Evidence was offered to prove that twenty per cent. had

been paid on the stock, and a dividend of fifty dollars on said stock.

No evidence was offered of any subscription for stock of the company by the defendant, or of any other express contract on the part of the defendant, and no evidence was offered tending to prove that the directors of said company had made any call for the payment of any portion of said stock under the direction of the stockholders, or that the stockholders, or a majority of them, represented at any regular meeting, had ever instructed the directors to make such call. The defendant objected to the evidence as variant from the contract declared on, and as no ground for recovery in this action, but the court overruled the objection and the defendant excepted.

Plaintiff having rested his case, defendant moved to exclude the evidence on ground of variance and on ground that the plaintiff could not recover in an action at law under the declaration, but the court denied the motion and defendant excepted.

The court instructed the jury that the order of the District Court offered in evidence was conclusive in these proceedings, and that the jurisdiction of the Bankruptcy Court could not be questioned in this suit, and that if satisfied that defendant was a stockholder they should find a verdict for the plaintiff for the amount unpaid on his stock with interest thereon, at six per cent., from August 15, 1872.

Defendant excepted to these instructions.

There was a verdict for the plaintiff, a motion for new trial, and a motion in arrest of judgment made and overruled, and judgment on the verdict.

The case was taken by writ of error to the Circuit Court of the United States for the Northern District of Illinois, errors were duly assigned and cause heard, and July 7, 1873, the Circuit Court affirmed the judgment of the District Court and rendered a judgment in favor of

the defendant in error, and against the plaintiff in error, for the amount of the judgment in the District Court, and the costs and the interest on the judgment and costs, and awarded execution therefor.

ASSIGNMENT OF ERRORS.

The plaintiff in error assigns and relies on the following errors, in the record of the District Court:

1. The court erred in admitting in evidence, on the trial, the order of the U. S. District Court of July 5, 1872, and in ruling that said order was binding and conclusive on the defendant in this action.

2. In admitting in evidence the certificate of stock, and evidence tending to show that defendant received it.

3. In denying the motion of defendant to exclude the evidence.

4. In instructing the jury, "that the order of the District Court offered in evidence was conclusive in these proceedings, and that the jurisdiction of the Bankrupt Court could not be questioned in this suit."

5. In instructing the jury, "that if they were satisfied that the defendant was a stockholder in said company, they should find a verdict for the plaintiff for the amount unpaid on such stock with interest thereon, at the rate of six per cent per annum since the 15th day of August, A.D. 1872."

6. In denying motions for new trial and in arrest of judgment.

And the plaintiff in error assigns, and relies upon the following errors in the record of the Circuit Court:

1. The court erred in affirming the judgment of the District Court.

2. The court erred in rendering a judgment in favor of the defendant in error, against the plaintiff in error, for the amount of the judgment in the District Court, with costs, and interest on the judgment and costs.

BRIEF.

I.

Admission in evidence of order of July 5, 1872, and ruling and instruction that order was binding and conclusive.

This order was made *ex parte* on the application of the assignee, without making defendant a party to the proceedings and without notice to him, although he resided in Chicago where the court was held at the time of the making of the order.

The evidence was objected to on the grounds that the proceedings in the District Court were *ex parte* without notice to defendant, that the court had no authority to make the order, and that the order was not binding or conclusive on defendant.

The court admitted the evidence and ruled and instucted the jury that the order was binding and conclusive in this action.

Record, 11, 12.

The effect of this ruling was that the defendant was held conclusively bound by an order entered in a proceeding to which he was not a party, and of which he had no notice while he was residing within the jurisdiction of the court.

1. It is well settled that a judgment or decree against a party without service of process or any step to bring him into court is void, and that one who is neither a party nor privy is not bound by a decree or judgment.

Railroad Company *v.* Trimble, 10 Wall. 367.

Kerr *v.* Watts, 6 Wh. 560.

Lenox *v.* Notrebe, Hemp. 251.

2. This ruling can only be sustained upon the ground

that the court had jurisdiction over the stockholders by virtue of having jurisdiction over the company.

This ground is not tenable. The corporation is a distinct entity. A stockholder is not a party to a proceeding against it by virtue of being a stockholder.

Whitman *v.* Cox, 26 Me. 335.
Rand *v.* Proprietors, etc., 3 Day, 441.
Merchant's Bank *v.* Cook, 4 Pick, 405.
Merrick *v.* Peru Coal Co., 61 Ill. 472.

II.

CERTIFICATE OF STOCK.

No evidence was offered on the trial of any subscription for stock of the company by defendant, or of any other express contract on the part of the defendant than that shown by the certificate of stock, and no evidence was offered tending to prove that the directors of the company had made any call for the payment of any portion of the stock issued to defendant under the direction of the stockholders, or that the stockholders or a majority of them represented at any regular meeting had ever instructed the directors to make such call.

Record, 13.

Evidence was offered tending to prove that a certificate of stock was issued to the defendant in or about January, 1870, containing in regard to the balance unpaid on the stock this provision: "The balance being subject to the call of the directors as they may be instructed by the majority of the stockholders represented at any regular meeting."

Transcript, 12, 13.

1. Variance. This certificate and the evidence in regard to it were objected to on the ground of a variance from the contract declared on.

The evidence was not admissible under either of the special counts.

It was not admissible under the counts in indebitatus assumpsit, as it showed a special contract in full force without proof of a call of the directors as specified in the certificate.

1 Chitty Pl. 305–313, 340.
Keyes *v.* Dearborn, 12 N. H. 52.
Stanwood *v.* Scovel, 4 Pick. 422.
Covington *v.* Comstock, 14 Pet. 43.
Hunneman *v.* Grafton, 10 Metc. 454.
Wait *v.* Morris, 6 Wend. 394.
Clark *v.* Smith, 14 Johns, 326.
Cragin *v.* Carmichael, 2 Dillon, 519.

2. The evidence was also objected to as furnishing no ground for recovery in this action.

This is an action at law.

By the express terms of the certificate of stock issued by the company to the defendant, the 80 per cent. sought to be recovered in this action was to remain subject to the call of the directors as they might be instructed by the majority of the stockholders at any regular meeting. No such call has ever been made.

The plaintiff cannot collect this balance, and has no remedy in an action at law.

(1.) The assignee in bankruptcy takes the property and rights of the bankrupt in the same plight and condition as the bankrupt possessed them with the single qualification that he can impeach a fraudulent conveyance or transaction of the bankrupt as a creditor might.

Mitford *v.* Mitford, 9 Vesey, Jr., 100.
In re Wynne, 4 N. B. R. 23.
Mitchell *v.* Winslow et al., 2 Story, 630-637.
Kelly *v.* Scott, 49 N. Y., 595.

(2.) By the bankrupt act the jurisdiction of the District Court extends "to the collection of all the assets of the bankrupt." This jurisdiction is to be exercised in

suits at law or in equity. The District Court sitting as a court of equity, and so far as this claim is concerned, with full equity powers, was, and is open to the defendant in error to enforce this claim.

Morgan *v.* Thornhill, 11 Wall. 65.
Goodall *v.* Tuttle, 3 Biss. 219.
Shearman *v.* Bingham, 7 N. B. R. 490.

(3.) The certificate is evidence of a valid contract between the company and the stockholder, fixing the manner in which the unpaid balance sought to be recovered should become due and payable.

The provision as to the balance subject to all was not made or designed to defraud creditors.

The intention of the parties clearly was that this balance should be called for in installments, as losses should occur or the exegincies of business require, no one then foreseeing the sudden disaster which afterwards befel insurance companies.

This money was payable on a contingency which has not happened, and cannot be recovered in an action at law. If an assignee has rights he must enforce them in a proper form of action.

Foster *v.* Hackley, 2 N. B. R. 417.
Stouffer *v.* Colman, 1 Yeates, 399.
In re Lyon, 7 N. B. R. 182.
2 Pars. Con. 675.

(4.) The call of the directors, instructed, etc., was a condition precedent to the plaintiff's right to recover in an action at law.

Brown *v.* Overbury, 11 Exch. 715.
Scott *v.* Corporation, etc. 28 L. J., Ch. 230.
Scott *v.* Avery, 25 L. J., Exch. 308.
Spangler *v.* I. & I. C. R. Co., 21 Ill. 276.
McCauley *v.* Carter, 22 Ill. 53.
Ellis *v.* Hubbard, 4 Ind. 206.
Taylor *v.* Fletcher, 15 Ind. 80.
P. &. K. R. R. Co. *v.* Dunn., 39 Me. 587.
P. & W. C. R. R. Co. *v.* Hickman, 28 Pa. 318.

(5.) The call made in the order of the United States District Court cannot have the effect, or take the place of the call provided for in the certificate of stock.

The jurisdiction of the District Court in bankruptcy proceedings is defined and limited by the bankrupt law, and does not put the judge or the court in the place of the directors and stockholders of a bankrupt corporation.

III.

Interest.

The court instructed the jury to allow interest at 6 per cent. on amount unpaid on stock since August 15, 1872, the date when stockholders were required in the order made in the District Court to pay to the assignee.

Record 14.

There is no law in the State of Illinois under which this interest could be recovered, unless it is the provision in the act of 1857, which provides that "the rate of interest upon all contracts and agreements, written or verbal, express or implied, for payment of money, shall be 6 per cent. per annum," etc.

Gross Statutes 1871, page 371.

We insist that the claim of the defendant in error is not within the provision of this law.

IV.

Judgment of Circuit Court.

The Circuit Court not only affirmed the judgment of the District Court, when the case was brought before it on a writ of error, but proceeded to render a new judgment for the amount of the judgment and costs in the District Court and interest on such judgment and costs. Transcript, 17.

By the judicial act of 1789, final judgments in a District Court "may be re-examined and reversed, or affirmed in a Circuit Court holden in the same district upon a writ of error," etc.

By the 24th section it is provided that when a judgment is *reversed* in a Circuit Court, such court shall proceed to render such judgment as the District Court should have rendered.

By the act of June 1, 1872, Sec. 2, it is enacted that "the appellate court may affirm, modify or reverse the judgment, decree or order brought before it for review, or may direct such judgment, decree or order to be rendered, or such further proceedings to be had by the inferior court as the justice of the case may require." 17 U. S. Stat., 197.

I see nothing in the laws of the United States to warrant this judgment.

Nor can it be claimed that there is anything in the laws or practice of the courts of Illinois to warrant the proceeding. The Supreme Court of Illinois sometimes affirms a judgment on a writ of error, and renders judgment for costs, but never proceeds to render a new judgment for the amount of the judgment and costs in the lower court and interest thereon.

I respectfully submit that the judgment of the Circuit Court should be reversed, and the court directed to reverse the judgment of the District Court.

JOHN H. THOMPSON,
Counsel for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

BENJAMIN CARVER,
Plaintiff in Error,

v.

CLARK W. UPTON, ASSIGNEE OF THE GREAT WESTERN INSURANCE COMPANY, A BANKRUPT,
Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR DEFENDANT IN ERROR.

L. H. BOUTELL,
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JAMESON & MORSE, Printers, 162 & 164 Clark St., Chicago.

SUPREME COURT OF THE UNITED STATES.

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CLARK W. UPTON, ASSIGNEE OF THE GREAT WESTERN INSURANCE COMPANY, A BANKRUPT,
Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

This is an action of assumpsit brought by Clark W. Upton, as assignee in bankruptcy of the Great Western Insurance Company, against Benjamin Carver, as a stockholder in said company, for the balance unpaid on his stock.

The charter of this company dated February 4th, 1857, fixed its capital stock at $100,000. Under the general insurance law of Illinois of March 11th, 1869, the company obtained the right on June 25th, 1870, to increase its capital stock to $5,000,000. Under this amended charter, it carried on a fire insurance business in Chicago, Illinois, till the great fire of October 8th & 9th, 1871. The losses sustained by reason of that fire rendered the company insolvent, but it undertook to continue its business till January 17th, 1872, when a petition in bankruptcy was filed against it in the United States District Court, for the Northern District of Illinois, on which petition it was adjudicated a bankrupt, February 6th, 1872. On the 11th day of April, 1872, said Upton was appointed the assignee in bankruptcy of said company.

Claims to the amount of about $800,000 were proved against the estate of said company. The assets of the company consisted for the most part of unpaid balances on its capital stock, which in most cases were eighty per cent. On the 5th day of July, 1872, on the representation of the assignee, the Bankruptcy Court made an order that the amount unpaid on said capital stock should be paid to the assignee on or before August 15th, 1872 and in default thereof, that the assignee proceed to collect the same, and that notice of said order be given to the stockholders by publication or otherwise. Notice of this order was accordingly given to the stockholders by publication and by mailing to each stockholder a copy of the order with a demand for payment.

Said Carver having failed to pay the amount due on his stock, after such demand, in accordance with the terms of said order, this suit was commenced in said District Court. Said Carver filed the plea of general issue, and on the trial the jury found for the assignee. The case was removed by said Carver by writ of error to the Circuit Court of the United States for said district, when the judgment of the court below was affirmed. Whereupon it was removed by writ of error to this court.

POINTS.

I.

The District Court had authority to make the Assessment.

By the terms of the subscription and the stock certificate, it was provided that the unpaid eighty per cent. of the stock was to be paid on the call of the directors, when ordered by a vote of the majority of the stockholders. It is therefore insisted that this amount can only be collected in the way thus provided.

But upon the bankruptcy of this company, its corporate powers so far at least as they were necessary for the winding up of its affairs, were transferred to the Bankruptcy Court. The functions of its direct-

ors and stockholders were at an end. Its unpaid capital stock was a trust fund for the benefit of its creditors, and it was the duty of the Bankruptcy Court to collect it, and administer it. This being so, how can it be said that the Bankruptcy Court must resort to the machinery provided for a living corporation to collect the assets of a dead corporation.

In the first place, if the court had the power to compel these directors and stockholders, who are scattered from Michigan to Utah, to come together, and to act, their action would be purely mechanical They could do neither more nor less than to record the order of the court. This enforced action was not what the original contract between the company and the stockholders contemplated, and so far as that contract was concerned would be equivalent to no action at all.

But, in the next place, it is clear that the contract between the stockholders and the company must have been formed in subordination to the bankrupt law; and that the method provided for collecting the unpaid stock had reference only to the action of the company so long as it remained solvent.

Even if the company had remained solvent, and its stockholders had refused to make an assessment to meet its liabilities, a Court of Equity would have appointed a receiver, and ordered him to make and collect the needed assessment. A Court of Bankruptcy has at least the powers of a Court of Equity in collecting and administering assets.

II.

No notice to the Stockholders of the Application to the District Court for the Assessment was necessary.

1. It is claimed that the stockholders are not bound by the order of the District Court, because they were not parties nor privies in that proceeding. To give this objection any validity this order must be regarded as a judgment *in personam*. If it were so, may it not be said

that these stockholders were parties in the larger legal sense of that term as defined by Mr. Greenleaf, which includes "all who are directly interested in the subject matter, and had a right to make defense, or to control the proceedings, and to appeal from the judgment?"

1 Greenleaf on Ev. § 522–524.
Robbins v. *City of Chicago*, 4 Wal. 672.

2. It may be said, if they were parties in this larger sense, they did not have notice of the application for this assessment. As, however, a corporation is made up of its individual stockholders, when it is in bankruptcy its stockholders must be considered as before the court, so far at least as to be chargeable with notice of all proceedings therein affecting the company. If a notice to them of the application for this assessment was necessary, then notice to them of every action of the court affecting the property of the company would be also necessary.

3. The stockholders were, however, notified that the assessment had been made, and they had an opportunity to go before the District Court and ask that the order be rescinded or modified, and if this was refused them they had an appeal to the Circuit Court in the form of a petition for review. Every defense was thus open to them which they could have had if they had been notified of the application for the assessment. Having neglected to avail themselves of this opportunity they cannot complain that they have not had their day in court.

4. But there is no propriety in regarding this order as a judgment *in personam*. If it is to be regarded as a judgment at all, it was rather in the nature of a judgment *in rem*. The order was an order as to the *res* simply. It directed that certain property of the company, in whosesoever hands it might be, should be collected by the assignee, but it did not undertake to describe the holders of this property. In every suit brought for it the defendant might interpose every defense personal to himself, such as that he was not a stockholder, that he had paid for his stock, or that he had a legal set-off to the claim. The only

defense from which he was excluded was the one and only defense which was open to him in the Bankruptcy Court, namely, that the order called for more money than was necessary.

1 Greenleaf on Ev. § 525.

5. If there was anything in this last objection, the stockholders should have availed themselves of it before the Bankruptcy Court or the Circuit Court. But in making an assessment the question of more or less is one resting purely in the discretion of the court. It is impossible to tell in advance how much would be collectable, and if more was collected than was necessary, the excess would be refunded. So that if the stockholders had been deprived, as they were not, of the opportunity of making this objection, they would not have been deprived of a very valuable right, or have suffered any loss of property.

In support of these points I cite—

Ward v. *Griswold, Man. Co.* 16 Conn. 593.
Adler v. *Milwaukee Pat. Brick Man. Co.*, 13 Wis. 61.
Exparte Hewdry, 15 Ves. 498.
Ogilvie v. *Knox Co. Ins. Co.*, 22 How. 380.
Upton v. *Hansborough*, 3 Bissell, 417.
Bankrupt Act of 1867, § 1, 37.
Angell & Ames on Corp'ns, (9th ed.) 599–604.
1 Redfield on Railways, § 50.
Scammon v. *Kimball*, 4 Chicago Legal News, 284.
Sawyer v. *Hoag*, 17 Wal. 610, 619.
Hull v. *United States Ins. Co.*, 5 Gill (Md.) 484.
Pentz v. *Hawley*, 1 Barb. Ch. 122.
Pettibone v. *McGraw*, 4 Mich. 441.
Sagory v. *Dubois*, 3 Sanford Ch. 466.

III.

An Action at Law is the proper remedy for Recovering this Debt.

If the order of the District Court was valid, nothing remained to be done but for the plaintiff in error to pay the balance due on his stock on demand. Failing to do this, an action at law was the proper method of enforcing payment.

IV.

Interest.

If the order of the District Court was valid, there was an implied agreement on the part of the plaintiff in error to pay the amount due on his stock. His refusal to pay after demand was unreasonable, and interest was properly allowed from the time fixed by the court for payment.

Gross St. Ch. 54

L. H. BOUTELL,
Of Counsel for Deft. in Error.

IN THE

Supreme Court of the United States

BENJAMIN CARVER,
Plaintiff in Error,

vs.

CLARK W. UPTON, ASSIGNEE OF THE GREAT WESTERN INSURANCE COMPANY, A BANKRUPT,
Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

ARGUMENT.

L. H. BOUTELL,
of Counsel.

CHICAGO:
JAMESON & MORSE, PRINTERS, 162 & 164 CLARK STREET.

1875.

SUPREME COURT OF THE UNITED STATES.

BENJAMIN CARVER,
Plaintiff in Error,
vs.
CLARK W. UPTON, ASSIGNEE OF THE GREAT WESTERN INSURANCE COMPANY, A BANKRUPT,
Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

ARGUMENT.

This is an action of assumpsit brought by Clark W. Upton, as assignee in bankruptcy of the Great Western Insurance Company, against Benjamin Carver, as a stockholder in said company, for the balance unpaid on his stock.

This company became bankrupt in consequence of the fire of October 9th, 1871, in Chicago. Claims to the amount of about $800,000 were proved against the estate of said company. The assets of the company consisted for the most part of unpaid balances on its capital stock, which in most cases were eighty per cent. On the 5th day of July, 1872, on the representation of the assignee, the Bankruptcy Court made an order that the amount unpaid on said capital stock should be paid to the assignee on or before August 15th, 1872, and in default thereof, that the assignee proceed to collect the same, and that notice of said order be given to the stockholders by publication or

otherwise. Notice of this order was accordingly given to the stockholders by publication and by mailing to each stockholder a copy of the order with a demand for payment.

Said Carver having failed to pay the amount due on his stock, after such demand, in accordance with the terms of said order, this suit was commenced in said District Court. Said Carver filed the plea of general issue, and on the trial the jury found for the assignee. The case was removed by said Carver by writ of error to the Circuit Court of the United States for said district, where the judgment of the court below was affirmed. Whereupon it was removed by writ of error to this court.

The plaintiff in error seeks to reverse the judgment of the court below mainly on the following grounds:

First. Because the District Court had no authority to make the order of July 5th, 1872, requiring the stockholders to pay to the assignee the balance unpaid on their stock.

Second. Because the plaintiff in error was not notified of the application for this order.

Third. Because the remedy of the defendant in error, if any, was in equity and not at law.

I.

The District Court had authority to make the Order.

First, then, had the District Court the authority to make the order of July 5th? The plaintiff in error says it had not, because, by the terms of the stock certificate, the balance unpaid on the stock was "subject to the call of the directors, as they may be instructed by the majority of the stockholders represented at any regular meeting." He claims that the call for this balance can only be made in the way provided in the stock certificate.

If this position were correct, then there must often be a failure of justice in this class of cases. For it will often happen, as in this case, where the stockholders are scattered from Michigan to Utah, that the court would have no means of reaching those whose duty it was to make the call. Even if they could be reached and brought together, the court could not compel them to act. It could punish them for contempt, but what then? This plan is then clearly *impracticable*.

But even if it were practicable, it would be *useless*. If these stockholders and directors could be brought together and made to act, their action would be purely mechanical. They could do neither more nor less than to record the orders of the court. Must the Bankruptcy Court resort to such a piece of mummery as this? Must it, in order to collect the assets of a bankrupt corporation, galvanize into seeming life these defunct officials, that they may yield an enforced assent to its commands?

This plan is not only impracticable and useless, it is *not the proper* method of collecting these unpaid balances. Upon the bankruptcy of this corporation, its corporate powers, so far at least as they were necessary for the winding up of its affairs, were transferred to the Bankruptcy Court. That court, and that court alone, had the power, and had all the power necessary to collect and administer its assets. The functions of its stockholders and directors were at an end. Among the assets of the company were the unpaid balances on the capital stock. From the case of *Wood* vs. *Sumner*, 3 Mason, 388, to the case of *Sawyer* vs. *Hoag*, in 17 Wal., 610, this unpaid capital stock has been held to be a trust fund for the benefit of creditors. It was the duty of the Bankruptcy Court to collect and administer it. Whatever contract existed between the stockholders and the company as to these unpaid balances, it must have been made in subordination to the bankrupt law. It must also have been made in subordination to the rights of creditors. The provisions of the stock certificate related only to rights of the stockholders and the company *inter se*, and so long as the company remained solvent. Underlying that contract was the obligation of the stockholders to the creditors of the company. It is that obligation which we are seeking to enforce.

In the case of the insolvency of a corporation, or where directors have refused to make calls to pay the debts of the company, it has always been the practice of courts of equity to appoint receivers and to direct them to make the calls for unpaid stock, even when the charter provided that the call should be made by particular officers in a particular way. As was said by the court in *Ward* vs. *Griswold Man. Co.*, 16 Conn., 593, "the discretion of the directors to make calls was only modal, relating to time and manner of payments. Where the wants of the company required those payments to be made it was their duty to cause them to be made. This might be effected by order of a Court of Equity, and mandamus was not necessary."

Ogilvie vs. *Knox Co. Ins. Co.*, 22 H., 380.

Adler vs. *Milwaukee Pat. Brick Man. Co.*, 13 Wis., 61.

The District Court, sitting in bankruptcy, had all the powers of a Court of Equity for this purpose. The assignee in bankruptcy represents the creditors, and has at least all the powers which the creditors would have had if bankruptcy had not occurred.

Sawyer vs. *Hong*, 17 Wal., 610.

Bankrupt Act of 1867, §§ 1, 37.

II.

No notice to the stockholders of the application for this order was necessary.

The only ground on which the plaintiff in error can claim that he was entitled to notice of the application for this order is, that he was thereby deprived of some valuable right without the opportunity of being heard.

In the first place, the rights of nobody was interferred with by this order. The unpaid balances on the capitals tock of this company being a trust fund for the benefit of creditors, it was the duty of the stockholders to pay in these balances when required by the ~~rules~~ needs of

the company. This order was simply an authority to the assignee to collect these balances. It did not name these stockholders nor define their liability. In every suit brought by the assignee, the defendant might set up every defense personal to himself, such as that he was not a stockholder, that he had paid for his stock, or that he had a legal set-off to the claim. He could not indeed set up the defense that the order called for more money than was necessary, as he might have done had he been present when the order was applied for for. But had he made this objection when the order was applied for, it would probably have availed nothing, for in making an assessment the question of more or less is one resting purely in the discretion of the court. It is impossible to tell in advance how much would be collectible. Besides, if more was collected than was needed, it would be repaid. So that in no event could the stockholders be deprived of any valuable right in consequence of this order.

Pentz vs. *Hawley*, 1 Barb. Ch., 122.

In the next place, though the stockholders were not notified of the application for this order, they had an opportunity to be heard in reference to it before suits were commenced against them. They were notified by publication and by mail of this order thirty days before the time fixed for payment, and though, in the narrower sense of the term, they were not parties to this proceeding, they were parties in the larger legal sense of that term as defined by Mr. Greenleaf, which includes "all who are directly interested in the subject-matter, and had a right to make defense, or to control the proceedings, and to appeal from the judgment."

1 Greenleaf on Ev., § 522–524.

Robbins vs. *City of Chicago*, 4 Wal. 672.

As members of this corporation these stockholders, on receiving this notice had the right and the opportunity to go before the Bankruptcy Court and ask that this order be modified or rescinded. If this was refused them, they had an appeal to the Circuit Court, in the form of a petition for review. Or they might file their petition for review in the Circuit Court in the first instance. These opportunities for

hearing, were not only open to them before suit was commenced, but they remained open up to the time of trial. If they neglected to avail themselves of them, they cannot complain that they have not had their day in court.

The mistake of the plaintiff in error on this point consists in regarding this order as a judgment *in personam*, whereas it more nearly resemble a judgment *in rem*. But really it is in no proper sense of the word a judgment. It is as we have stated, simply an order authorizing the assignee to collect in certain property of the company from whoever might be liable for it, and as reasonable notice was required to be given to the stockholders before the time fixed for payment, and an opportunity was thus given them to be heard either before the District Court or the Circuit Court, it really operated simply as an order *nisi*.

If the claim of the stockholders is correct that they were entitled to notice of the application for this order, then they were entitled to notice of every action of the court affecting the property of the company. The more reasonable view would seem to be, that as a corporation is made up of its individval members; when it is in bankruptcy, its members must be considered as before the court, so far, at least, as to be chargeable with notice of all proceedings therein affecting the company.

Upton vs. *Hansborough*, 3 Bissell, 417.

III.

An action at law was the proper remedy.

The plaintiff in error further objects that the remedy of the assignee, if any, is in equity and not at law. But if the order of the District Court was valid, nothing remained to be done but for the plaintiff in error to pay the balance due on his stock on demand. Failing to do this, an action at law was the proper method of enforcing payment. Indeed the case turns upon the power of the District Court to make this order. If upon the bankruptcy of the company, the powers

of the officers of the company to make an assessment devolved upon the Bankruptcy Court, then no notice to the stockholders was necessary before making the order, and after it was made an action at law, was the proper remedy to enforce the obligation which it created.

Upon all these points the case of *Hall* vs. *U. S. Ins. Co.*, 5 Gill (Md.), 484, 487–489, 500, is on all fours with the present case. There a creditor of the company petitioned the Baltimore County Court, sitting in equity, to appoint receivers of the company, and on notice to the company, this was done; and on representation to the court that it was necessary to collect the unpaid balances on the stock to pay the debts of the company, it was ordered that notice by publication be given to the stockholders to pay such balances, and on their failure to do so, that suits be commenced against them. Said notice was given and an action of assumpsit commenced against a stockholder for the unpaid balances on his stock. It was objected that the court could not order the stock to be paid, as by the act of incorporation calls could only be made by the Board of Directors; that the order of the court that the unpaid balances should be collected was not binding on the defendant, as he was not a party to the proceedings; and that he was not bound by notice by publication of the order.

The court say: "The proceedings of the Baltimore County Court, when sitting in equity, which was objected to as evidence, were not offered as an adjudication of any of the rights of the parties in any suit between them, and upon that ground as admissible evidence in the present controversy; but were offered without reference to the parties thereto, for the purpose of showing by what authority the present action was prosecuted. In that aspect of their being offered, they are obnoxious to neither of the reasons urged for their rejection. The court's order for the institution and prosecution of this suit was definite and final. As to the power exerted by the Baltimore County Court, sitting in equity in the proceedings before it, it is believed no well founded exception can be taken. It was indispensably necessary

for the prevention of fraud and to do justice to persons whose grievances were undeniable and incapable of relief anywhere else, or in any other way than that pursued by the County Court."

IV.

Interest.

If the order of the District Court was valid, the refusal of the plaintiff in error to pay the amount due on his stock on demand was unreasonable, and interest was properly allowed by way of damages from the time fixed by the court for payment, even though the State statute did not provide for such cases.

Pope vs. *Barrett*, 1 Mason, 117.
Young vs. *Godbe*, 15 Wal., 564.
Gross St., ch. 54.

The true rule on this subject is clearly laid down in *Young* vs. *Godbe*, 15 Wal., 546:

"If a debt ought to be paid at a particular time, and is not, owing to the default of the debtor, the creditor is entitled to interest from that time by way of compensation for the delay in payment."

"If there is no statute on the subject, interest will be allowed by way of damages for unreasonably withholding payment of an overdue account."

V.

The judgment of the Circuit Court.

The plaintiff in error objects that the Circuit Court, in affirming the judgment of the District Court, had no power to award interest on that judgment, and should have remanded the case to the District Court, instead of entering a new judgment and awarding execution thereon.

The allowance of interest in such cases is expressly authorized by the judiciary act of 1789, sec. 23, R. S. sec. 1010.

As to the judgment to be entered by the Circuit Court in affirming the judgment of the District Court, the judiciary act of 1789 made no provision. But the act of June 1, 1872, sec. 2, U. S. St. vol. 17, p. 196, R. S. 636, authorizes the entry of a new judgment in the Circuit Court, or the remanding of the case to District Court, in such cases. When the judgment of the Circuit Court may be reviewed by the Supreme Court, the entry of a new judgment would seem to be the only proper course to pursue. And such has always been the practice in the Northern District of Illinois.

L. H. BOUTELL,
of Counsel.

Agenda No......

IN THE

SUPREME COURT OF THE UNITED STATES

BENJAMIN CARVER,

Plaintiff in Error,

vs.

CLARK W. UPTON, ASSIGNEE OF THE GREAT WESTERN INSURANCE COMPANY, A BANKRUPT,

Defendant in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

ARGUMENT.

.....*A. D. 1875.*

.....*Clerk.*

L. H. BOUTELL,

of Counsel.